



February 17, 1999

Mr. John Patterson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR99-0485

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122043.

The City of Waco (the "city") received a seven-part request for information concerning the Brazos Higher Education Authority (the "authority") and the city's correspondence with the authority. You submitted representative samples of information responsive to items "a", "b", "c", and "d" of the request.¹ You seek to withhold the requested information under section 552.103 of the Government Code.

Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

¹In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

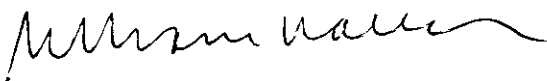
You contend that the requested information relates to pending litigation to which the city is a party, *Brazos Higher Education Authority, Inc. and Brazos Higher Education Services Corporation, Inc. v. Don Wharton* and *Don Wharton v City of Waco, Texas*, Cause No. 98-2087-3, in the 74th District Court, McLennan County. We have examined the information you submitted as responsive to items "a", "b", "c" and "d" of the request. We conclude that you may withhold the submitted information under section 552.103.

Please note however that, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

It appears that the availability from the city of information responsive to items "e", "f" and "g" of the request is in fact an issue in the above-referenced litigation. It is the policy of this office not to address issues which are the subject of pending litigation. Accordingly, we make no findings with respect to the availability of information responsive to items "e", "f", and "g" of the request. We will allow the court to resolve the issue of whether the city must make information responsive to items e, f, and g of the request available to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/nc

Ref: ID# 122043

Enclosures: Submitted documents

cc: Mr. Don Wharton
3824 West Waco Drive
Waco, Texas 76710
(w/o enclosures)